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MEMO ENDORSED

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BY ECF

The Honorable Kenneth M. Karas
United States District Court
Southern District of New York
300 Quarropas Street
White Plains, New York 10601-4150

Re: *United States v. Shaun Brooks*, Nos. 09 Cr. 1022 (KMK); 16 Cr. 53 (KMK)

Dear Judge Karas:

I write to respectfully request that the Court defer decision on Shaun Brooks' motion under 18 U.S.C. § 3582(c) and that counsel be reappointed for the purpose of supplementing his motion once this Court regains jurisdiction. Mr. Brooks has a pending appeal before the Second Circuit related to the sentence in this case (No. 20-1330). "The filing of a notice of appeal is an event of jurisdictional significance' because 'it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" *United States v. Vigna*, 455 F. Supp. 3d 68, 72 (S.D.N.Y. 2020) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). This jurisdictional rule "does not permit courts to modify a judgment substantively." *Id.* (internal quotation marks omitted).

Under Rule 37 of the Federal Rules of Criminal Procedure, if this Court "lacks authority to grant" the motion before it because of a pending appeal, it may "(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Crim. P. 37(a). Accordingly, the Court should defer decision on the motion until counsel has applied to the Second Circuit for a stay and remand. Alternatively, the Court should issue an indicative ruling under Rule 37 that Mr. Brooks' motion raises a substantial issue. See Fed. R. App. P. 12.1(b) ("If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal.").

Should the Court reappoint counsel, counsel's supplement would concisely respond to the government's letter brief filed yesterday. One misconception that the government repeats is that medical management of an underlying comorbidity has

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a *positive* effect on the seriousness of a COVID-19 infection. However, whether the underlying comorbidity is well-treated has not been shown to have any bearing on the risk of serious illness in the event of contracting COVID-19. And, in fact, "the myriad of drugs prescribed for these comorbidities will also . . . limit additional treatment options available for COVID-19."¹ Relatedly, some treatments have a negative impact on COVID-19 progression. In some cases, medical researchers are not certain whether it is the underlying comorbidity or the treatment that makes a person more likely to experience severe illness from COVID-19. *Id.* Another issue not addressed so far concerns Mr. Brooks' obesity, which "may triple the risk of hospitalization due to a COVID-19 infection,"² and race. Black people are 3.7 times more likely to be hospitalized for COVID-19 and 2.8 times more likely to die from it when compared to white, non-Latino people.³

Rate ratios compared to White, Non-Hispanic persons	American Indian or Alaska Native, Non-Hispanic persons	Asian, Non-Hispanic persons	Black or African American, Non-Hispanic persons	Hispanic or Latino persons
Cases ¹	1.8x	0.6x	1.4x	1.7x
Hospitalization ²	4.0x	1.2x	3.7x	4.1x
Death ³	2.6x	1.1x	2.8x	2.8x

Respectfully submitted,

/s/ Ezra Spilke

cc: All counsel of record

Both requests are granted.

So Ordered.



1/29/21

¹ Lauren A. Callender, *The Impact of Pre-existing Comorbidities and Therapeutic Interventions on COVID-19*, *Frontiers in Immunology* (Aug. 11, 2020), <https://dx.doi.org/10.3389/fimmu.2020.01991>.

² CDC, *Obesity and COVID-19*, <https://www.cdc.gov/obesity/data/obesity-and-covid-19.html> (last accessed Jan. 29, 2021).

³ CDC, *Hospitalization and Death by Race/Ethnicity*, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (updated Nov. 30, 2020).